

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HANS-ULRICH BUSCHHAUS
PETER SPETMANN, THOMAS JAETSCH
and MARTIN KUGLER

Appeal No. 2006-0370
Application 09/552,044

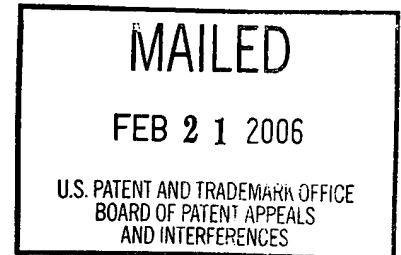
ON BRIEF

Before CAROFF, KIMLIN, and JEFFREY T. SMITH, Administrative
Patent Judges.

Caroff, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 40-47, all of the claims now pending in appellants' application.



The appealed claims relate to an aqueous system which includes a hydrolysis-sensitive active component (e.g., dichlofluanid, tolylfluanid, or fluorfolpet), and one or more binders having a $\text{pH} \leq 7$ (e.g., alkyd resins based on vegetable oils or acrylate dispersions) which stabilize the active component.

Appellants stipulate on page 3 of their brief that all of the appealed claims stand or fall together for purposes of this appeal. Accordingly, we shall limit our consideration to claim 40, one of four independent claims, which reads as follows:

40. An aqueous system comprising:

(A) a component selected from the group consisting of dichlofluanid, tolylfluanid, fluorfolpet, and mixtures thereof, and

(B) one or more binders having a $\text{pH} \leq 7$ selected from the group consisting of (i) alkyd resins based on vegetable oils and (ii) acrylate dispersions,

wherein the aqueous system is storage stable.

The prior art references relied upon by the examiner are:

Eversole et al (Eversole)	3,113,399	Dec. 10, 1963
Heuer et al. (Heuer)	5,972,971	Oct. 26, 1999
Ludwig et al. (Ludwig)	5,990,143	Nov. 23, 1999

The following rejections are before us for review:

1. Claims 40-47 stand rejected under 35 U.S.C. § 112, second paragraph, for alleged indefiniteness.

2. Claims 40-47 stand rejected under 35 U.S.C. § 103(a) for obviousness in view of Eversole taken in combination with Heuer.

3. Claims 40-47 stand rejected under 35 U.S.C. § 102(e) as anticipated by, or in the alternative under 35 U.S.C. § 103(a) as obvious over, Ludwig.

We have carefully considered the record in light of the respective positions taken by the examiner and the appellants. Having done so, we shall reverse the first rejection noted above. However, we shall affirm the second and third rejections essentially for the reasons advanced by the examiner.

The basis for our decision follows:

REJECTION 1

With regard to the 35 U.S.C. § 112 rejection, it appears the examiner's underlying belief in making the rejection is that "acrylate dispersions" is overly broad terminology. However, the fact that the language used may be broad in scope does not necessarily make it indefinite.

As noted by the appellants, their specification indicates that such binders are known and are commercially available. Accordingly, the meaning and scope of the term "acrylate

dispersions" presumably would be readily understood by those of ordinary skill in the art.

REJECTION 2

With regard to the rejection based on Eversole and Heuer, it is our view that the examiner has made out a prima facie case of obviousness essentially for the reasons set forth in the examiner's answer.

As indicated by the examiner, Eversole discloses an aqueous coating formulation which may contain both an active fungicide, e.g., Captan (Example II), and a binder, e.g., penta soya oil alkyd resin (col. 3, l. 38; Example VII). We agree with the examiner that it would have been prima facie obvious, within the context of 35 U.S.C. § 103, to substitute one of the sulfenamides recited in the instant claims for Captan in Eversole since Heuer (col. 4, l. 58-9) suggests that the instant sulfenamides and Captan, which is also a sulfenamide, are alternative fungicides.

Appellants' argument relating to the storage stability of their composition is unpersuasive since appellants have failed to adduce any evidence comparing the storage stability of their composition relative to prior art formulations. Moreover, none of the instant claims are limited in any way with regard to the length of time that the composition in issue may be stored.

REJECTION 3

We shall also affirm the rejection based upon Ludwig since, in our opinion, Ludwig anticipates the instantly claimed system. Alternatively, it would have been prima facie obvious within the purview of 35 U.S.C. § 103 to have chosen one of the sulphenamide fungicides disclosed by Ludwig (col. 5, l. 55-56), to increase the activity or action spectrum of the reference composition, to be used in combination with a "particularly preferred" alkyd resin binder (col. 4, l. 57-59), absent a showing of any new or unexpected result.

As noted by the examiner, the Ludwig compositions are disclosed as being "water-based" formulations, and as being "storage-stable" (col. 2, l. 12-16). Also, the instant claims are open to the inclusion of other ingredients, such as the primary azole and quaternary ammonium fungicides of Ludwig.

For the foregoing reasons, appellants' arguments relating to an alleged lack of motivation to select their specific combination of sulphenamides and binders are not persuasive.

We also agree with the examiner that the appellants have the burden of establishing that the preferred binders of Ludwig do not satisfy the pH condition set forth in the instant claims.

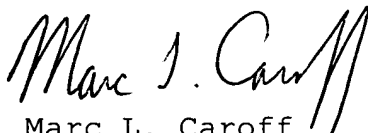
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In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA
1977).

In view of the foregoing, the decision of the examiner is
affirmed.

No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
§ 1.136(a)(iv) (effective Sept. 13, 2004).

AFFIRMED



Marc L. Caroff)
Administrative Patent Judge)



Edward C. Kimlin)
Administrative Patent Judge)



Jeffrey T. Smith)
Administrative Patent Judge)

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MLC/cam

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Lanxess Corporation
111 RIDC Park West Drive
Pittsburgh, PA 15275-1112